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CITATIONS

Cases—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 413

CONTINENTAL OIL COMPANY, A CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 496–515) is reported in 113 F. (2d) 473. The findings of fact, conclusions of law, order, and direction of election of the National Labor Relations Board (R. 27–73) are reported in 12 N. L. R. B. 789.

JURISDICTION

The judgment of the court below (R. 538–541) was entered on August 19, 1940. A petition for rehearing (R. 516–537) was denied on July 31, 1940 (R. 537). The petition for a writ of certiorari

was filed on September 9, 1940, and was granted on October 28, 1940, limited to the first and second of the eight questions presented by the petition. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

The questions as to which the petition for a writ of certiorari was granted, as set forth in the petition, are as follows:

"1. Where an employee (Ernest Jones) is ordered transferred from one place of employment to another place of employment in violation of the National Labor Relations Act and refuses to accept such transfer and quits his employment, does the National Labor Relations Board have the power to order such employee's reinstatement to his former position where it appears that immediately after the cessation of his employment he purchased, and, at all times since has operated, a general merchandise store as proprietor thereof in addition to acting as United States postmaster? If such power in the Board exists, is it an abuse of discretion to order such reinstatement?"

"2. Where an employee (F. D. Moore) is ordered transferred from one place of employment to another place of employment in violation of the National Labor Relations Act and refuses such

transfer on account of the alleged illness of his wife, and the employer, after verifying such illness, within a day or two after the transfer order offers the employee reinstatement to his old position "for the duration of his wife's illness," which offer the employee refuses and thereupon quits his employment from which he was receiving a wage of $112.50 per month (without room and board) and accepts and retains employment at the Wyoming State Penitentiary at a wage of $70 per month, plus room and board, and it appears that at all times up to the hearing before the Trial Examiner of the Labor Board the wife's illness continued, does the Board have the power to order such employee's reinstatement, or, if such power exists, is it an abuse of discretion to order such reinstatement?"

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix to the Board's brief in the *Phelps Dodge* cases, Nos. 387 and 641, to be argued herewith.

STATEMENT

Upon the usual proceedings, the Board, on May 9, 1939, issued its findings of fact, conclusions of law, order, and direction of election (R. 27–73). Those findings which are pertinent to the

issues before this Court[1] may be briefly summarized as follows:[2]

In April 1936 petitioner, an oil company, discriminatorily transferred two of its employees, Ernest Jones and F. D. Moore, from its Big Muddy field in Wyoming, to its Hobbs, New Mexico, field, because of their membership and activities in the International Association of Oil Field, Gas Well and Refinery Workers of America, a labor organization herein called the Union (R. 43–49).

Jones refused to accept the transfer, and reported for work at Big Muddy, but was informed by his superiors that there was no work for him and that he had "quit" (R. 44; 190, 209–212, 233, 245, 321, 346, 491).[3]

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[1] Before the Board and in the court below the case involved numerous questions which either were not raised in the petition for certiorari or which this Court excluded from its consideration by limiting the writ to the first two questions therein presented.

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[3] The record plainly shows Jones was discharged. He was told he was "through" (R. 210, 212, 245), asked to vacate his company house (R. 210), and given a "Termination Check" (R. 214–215, 245). Petitioner's records contain an entry approving Jones' "termination allowance" and stating "services no longer required" (R. 491). At the hearing petitioner's general superintendent testified that Jones was informed he had to accept the transfer "if he wanted to continue his employment" (R. 321).

Moore likewise refused the transfer and pointed out that his wife was bedridden; thereupon he was offered a transfer to another field of petitioner in Colorado which he likewise refused; petitioner thereupon offered to retain him at Big Muddy for the duration of his wife's illness, but Moore declined to return on this temporary basis (R. 44–45; 186–187, 276–278, 285, 317–318, 485–486).[4]

Upon these findings, the Board concluded that petitioner had discriminated against Jones and Moore in violation of Section 8 (3) and (1) of the Act (R. 49), and ordered that they be reinstated (R. 72).

On May 25, 1939, petitioner filed in the court below a petition to review and set aside the Board's order (R. 1–19). The Board answered, requesting enforcement of its order (R. 19–26). On June 13, 1940, the court handed down its opinion and entered a short form judgment enforcing the Board's order (R. 496–516). A petition for rehearing filed by petitioner (R. 516–537) was denied on July 31, 1940 (R. 537). On August 19, 1940, the court, reciting that its previous judgment appeared to be insufficient, vacated that judgment

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[4] The evidence clearly shows that Moore, like Jones, was discharged. Moore received a "Termination Check" (R. 271) and, at petitioner's request, vacated his company house (R. 270, 273). Petitioner's records contain an entry approving Moore's "termination allowance" and stating "services no longer required" (R. 492).

and entered a long form judgment to the same effect (R. 538–541).

On October 28, 1940, this Court granted a writ of certiorari limited to the first and second questions presented by the petition for certiorari (R. 542).

SUMMARY OF ARGUMENT

I

The order requiring the reinstatement of Jones and Moore is valid, whether or not they retained their status as employees, as an exercise of the Board's power to require "such affirmative action * * * as will effectuate the policies of this Act." Power to direct this appropriate relief has not been denied to the Board by the inclusion in Section 10 (c) of the phrase "including reinstatement of employees with or without back pay." In the present case the reinstatement of the two union leaders will effectuate the Act's policies by dissipating the coercive effects of their elimination upon the employees' self-organization.

II

If the Board is limited to the "reinstatement of employees," the validity of the order as to Jones turns upon the meaning of "employees" in Section 10 (c). If, as we contend, the term refers to members of the working class generally, it does not include Jones, who became an entrepreneur prior to the Board's order, and the order falls as to him.

But if "employees" in Section 10 (c) refers to employees of the particular employer as defined in the latter part of Section 2 (3), the order is valid as to Jones: the "employee" status of men whose work ceases as a result of unfair labor practices is expressly continued until they obtain "regular and substantially equivalent employment." It is not contended that Jones obtained such employment.

III

If the Board is limited to the "reinstatement of employees," the order is nevertheless valid as to Moore. If "employees" is used in its generic sense, the order is plainly within the Board's power. And even if "employees" refers to employees of the particular employer as defined in the latter part of Section 2 (3), there is no ground for a contention that Moore obtained "regular and substantially equivalent employment" subsequent to the discrimination against him. There is neither proof nor findings to that effect and petitioner did not raise such a contention at the hearing or adduce any evidence to support it.

Petitioner is not on firm ground in contending that even if the employer makes no claim that the "substantially equivalent employment" exception applies to the particular worker involved, the Board must nevertheless introduce evidence and make findings on the point. If successful, the con-

tention would place a difficult and wasteful burden upon the Board without adequate cause.

If a finding concerning equivalent employment is mandatory in every case, however, it does not follow that the Board's order should be set aside as to Moore. The evidence plainly does not support petitioner's apparent contention that only a finding that Moore's subsequent employment was equivalent could validly be made. Indeed, it affirmatively appears that that employment was so different in important respects from Moore's position with petitioner, that a finding of equivalence could not be made. For this reason, even if the Court determines that a remand would otherwise be necessary for the making of a finding, a remand would be idle in the circumstances of this case.

ARGUMENT

Introductory.—Petitioner's assignment as error and argument of matters which are relevant only to questions as to which the writ was denied (Pet. Br. 13; Pet. for Cert. 11–12; R. 542) are plainly improper. Similarly, the contention (Pet. Br. 14–15, 23) that the portions of the decree under review must be reversed because of an asserted variance between the complaint and the Board's findings, was not advanced in the petition and may not now be urged.[6]

[6] The claim of variance is inconsistent with the statement in the petition (p. 3) that "the charge and finding of the Board were that in April 1936, the Petitioner had dis-

The statement in each of the questions presented that the employee concerned "quit his employment" is contrary to the Board's findings, which the Circuit Court of Appeals confirmed (R. 513). The Board found (R. 44), and the finding is amply supported (*supra*, p. 4), that Jones persisted in his attempts to work at the job from which petitioner discriminatorily transferred him, but that petitioner would not permit him to work. As to Moore, the Board held that "whenever any substantial change in the status of an employee is made upon a discriminatory basis, the refusal of the employee to accept the changed status cannot be considered as a resignation from employment. * * * Accordingly the refusal of this offer by Moore did not operate as a voluntary termination of employment" (R. 48; see p. 5, *supra*).[6]

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charged Jones and Moore for union reasons, in violation of the Act." In any event, the contention clearly lacks merit. Petitioner fully litigated the issue of discriminatory transfer and does not claim that it was in any way misled or prejudiced. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 349–350; *National Labor Relations Board* v. *Express Publishing Co.*, No. 442, this Term, decided March 3, 1941.

[6] The Board cited in support of its position *Matter of Clover Fork Coal Co.*, 4 N. L. R. B. 202, enf'd, *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. (2d) 331 (C. C. A. 6), where union men ceased work as a result of their refusal to accept discriminatory assignments to work in dangerous sections of the mine or sections so rocky that their earnings would be extremely small (4 N. L. R. B. at 221–222, 225, 226, 227). The Board also cited *Matter of Waggoner Refining Co.*, 6 N. L. R. B. 731, 753–757, consent

Our argument will be confined to a consideration whether the Board could validly require the reinstatement of Jones and Moore to remedy petitioner's discrimination against them. The extent of the Board's power to order reinstatement, and various possible constructions of the Act relative to that issue, are fully discussed in the Board's brief in the *Phelps Dodge* cases, Nos. 387 and 641, to be argued herewith, at pp 38–54. We respectfully refer the Court to that brief, and shall here

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decree entered January 4, 1939 (C. C. A. 5), where two employees were discharged upon refusal to accept discriminatory demotions. Compare *National Labor Relations Board* v. *American Potash & Chemical Co.*, 98 F. (2d) 488, 493 (C. C. A. 9), certiorari denied, 306 U. S. 643, enforcing an order of the Board requiring reinstatement with back pay of an employee who resigned because of discriminatory working conditions. On induced resignation as a constructive discharge, see also *Matter of R. C. Hoiles et al.*, 13 N. L. R. B. 1122; *Matter of Ingram Mfg. Co.*, 5 N. L. R. B. 908, 917–918; *Matter of Harlan Fuel Co.*, 8 N. L. R. B. 25, 41, 52–59; *Matter of Pulaski Veneer Corp.*, 10 N. L. R. B. 136, 152–154; *Matter of Sterling Corset Co., Inc.*, 9 N. L. R. B. 858, 866–868. The House Committee mentioned "demotion or transfer" and "forced resignation" as forms which violations of Section 8 (3) might take. H. Rept. 1147, 74th Cong., 1st Sess., p. 19 (quoted at pages 20–21 of our brief in the *Phelps Dodge* cases). The Board's reasoning concerning an employee's refusal to accept a substantial discrimination in working conditions is likewise in accord with the common law doctrine of forced abandonment of employment. *Cf. Murphy* v. *Williamson*, 180 Ia. 291, 163 N. W. 211; *Langguth* v. *Rurmeister*, 101 Minn. 14, 111 N. W. 653; *Erickson* v. *Sorby*, 90 Minn. 327, 96 N. W. 791; *Bishop* v. *Ranney*, 59 Vt. 316, 7 Atl. 820; *Sigmon* v. *Goldstone*, 101 N. Y. Supp. 984.

discuss only the application to the facts of this case of the various arguments advanced therein.

I

THE BOARD HAS THE POWER TO DIRECT AFFIRMATIVE RELIEF WHICH WILL EFFECTUATE THE POLICIES OF THE ACT. THE REINSTATEMENT ORDER HERE WILL EFFECTUATE THOSE POLICIES

Section 10 (c) of the Act empowers the Board to direct an employer found to have committed unfair labor practices to cease and desist from the practices found and

> to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

In the *Phelps Dodge* brief, pp. 38–44, we argue that the power of the Board under this provision extends to any type of affirmative relief which it may validly find will effectuate the policies of the Act in the circumstances of the case at hand. We particularly contend (pp. 40–44) that the phrase "including reinstatement of employees with or without back pay" in Section 10 (c) is but illustrative of the Board's power to direct affirmative action, and that it does not operate as a qualification upon the Board's power to remedy discrimination "in regard to hire or tenure of employment" in violation of Section 8 (3). If that argument be accepted, it eliminates any further question as to the validity of the reinstatement order in the pres-

ent case, with respect both to Jones and Moore, except the question whether the Board could properly find that their reinstatement would, in the circumstances of the present case, effectuate the policies of the Act. If, on the other hand, that argument be rejected, there remain questions, likewise discussed in the *Phelps Dodge* brief, as to what persons enjoy the status of "employees" as that term is used in Section 10 (c). Whether Jones and Moore possess that status, and other related questions, are discussed *infra,* pages 14–22. Here we assume the correctness of the proposition that the Board has power to direct any affirmative relief which will effectuate the policies of the Act, and turn to the question whether the Board could properly find that the reinstatement of Jones and Moore would effectuate those policies.

Reinstatement is, of course, the normal affirmative remedy for illegal deprivation of employment. Any contention that it would not effectuate the policies of the Act in this case must rest, as to Jones, on his transformation from wage earner to shopkeeper, and, as to Moore, on his having obtained other substantially equivalent employment within Section 2 (3).

We argue generally in the *Phelps Dodge* brief, pp. 51–54, that the acquisition of equivalent employment by a discriminatorily excluded worker does not in itself remove the basis upon which the

Board may reasonably conclude that his reinstatement is appropriate to effectuate the purposes of the Act. That argument is equally applicable to transfer from the ranks of the workers to those of the entrepreneurs.

Further, the present case aptly illustrates the point made in the *Phelps Dodge* brief, p. 53, that under the construction of the Act urged by the employers they may thwart self-organization in a plant by eliminating the union leaders, in the hope that necessity will compel the victims to secure other employment which will bar their reinstatement. Jones and Moore were both long-time officers of the Union, were two of three members of the "Workmen's Committee" which conducted the Union's negotiations with petitioner, and were the most militant members of the Union (R. 46–47; 171, 183, 185, 192, 193, 194, 198–199, 241, 267–268, 355). Unquestionably their elimination by petitioner, whether by discharge, transfer, or forced resignation, dealt a staggering blow to the self-organization of petitioner's employees (cf. R. 185, 241), the effects of which should be eradicated, the Board might properly find, by the reinstatement of the two men. To the appropriateness of such a remedy to effectuate the Act an inquiry whether the men have obtained other employment or have left the "employee" class plainly has little relevance.

II

IF THE BOARD MAY REINSTATE ONLY "EMPLOYEES" THE VALIDITY OF THE ORDER AS TO JONES TURNS ON THE MEANING OF "EMPLOYEES"

If the argument which we have just made is rejected, and it is held that under Section 10 (c) the Board's power to direct affirmative action to remedy violations of Section 8 (3) is limited to reinstatement of "employees," the validity of the reinstatement order as to Jones depends upon what construction is placed upon the word "employees" in Section 10 (c). The interpretation of that term is fully discussed in the *Phelps Dodge* brief, pp. 45–49. We there argue that except for purposes of Sections 8 (5) and 9 (a) (the collective bargaining provisions) the term "employees" is used throughout the statute, including Section 10 (c), in its generic sense, as meaning members of the working class generally.

If this contention is accepted, and it is at the same time held that the Board may reinstate only "employees," it follows that the reinstatement order may not be sustained as to Jones. For it is true, as petitioner urges, that Jones is no longer an employee of anyone, or in the employee class. Hence if membership in that class is a prerequisite to reinstatement the order must fall as to him.

On the other hand, if this construction of "employees" be rejected, and it is held that the latter part of the definition of "employee" in Section

2 (3) controls, the order should be sustained as to Jones. The latter part of Section 2 (3) provides that "employee" "shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *". Jones ceased work as a result of an unfair labor practice, and petitioner does not urge that Jones has obtained substantially equivalent employment; rather its asserts (Br. 19) that he is not "an employee of anyone." Under the quoted provision of Section 2 (3), therefore, Jones retains the status of an employee of petitioner, and if that provision is controlling for purposes of Section 10 (c), Jones is squarely within "reinstatement of employees." Cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347.

III

THE ORDER IS VALID AS TO MOORE

Even if the restrictive interpretation of Section 10 (c) is adopted, so that the order is valid only as an exercise of the power expressly granted the Board in Section 10 (c) to require the "reinstatement of employees," the order is nevertheless valid as to Moore.

If "employees" is used in Section 10 (c) in its generic sense it plainly may not be contended that

by virtue of his asserted obtainment of substantially equivalent employment, Moore ceased to be an "employee." Section 2 (3) provides that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer * * *." As we have argued in the *Phelps Dodge* brief (pp. 45–48), the obtainment of equivalent employment is relevant only to the status of the worker as an employee of a particular employer for purposes of the operation of Sections 8 (5) and 9 of the Act.

In the event that this argument is rejected and it is determined that "employees" in Section 10 (c) refers only to those who satisfy the latter part of Section 2 (3), that is "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment," it is apparent that Moore is not excluded by reason of the last qualification. There is neither proof nor findings that Moore obtained such employment. Petitioner did not raise the point of substantially equivalent employment at the hearing before the Board's trial examiner and the facts as to Moore's subsequent employment were adduced in the course of inquiry as to his subsequent earnings for the purpose of computing deductions from the amount of back pay he is to receive (R. 273–274, 301, 303–304). There was no

occasion, in the absence of a contention by petitioner, either expressly advanced or implied in the questioning of witnesses, for the Board's attorney to inquire as to facts bearing upon the equivalence of the new employment to the old.[7]

Nor was there any occasion for a finding by the Board upon whether Moore's employment at the penitentiary was or was not "regular and substantially equivalent" to the job from which petitioner discriminatorily excluded him. Petitioner's assertion (Pet. Br. 25–26) that whether or not it raised and litigated the point, a finding concerning it was prerequisite to a reinstatement order, is not supported by the Act or any decision under it. The cases cited by petitioner (Pet. Br. 17–18) are beside the point. In *Mooresville Cotton Mills* v. *National Labor Relations Board*, 94 F. (2d) 61 (C. C. A. 4), 97 F. (2d) 959, 110 F. (2d) 179, and *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533 (C. C. A. 9), certiorari denied, 306 U. S. 646, the obtaining of equivalent employment was raised before the Board as a ground for denying the usual reinstatement remedy, evidence was adduced relevant to that question, the Board found that the employees in

[7] As we stated in our Supplemental Memorandum in opposition to the petition for certiorari, the equivalent employment contention was first raised in petitioner's brief before the Board, submitted long after the hearing, and was not preserved as required by the Board's Rules and Regulations.

question did not obtain such employment, and the court enforced the order. In *National Labor Relations Board* v. *Botany Worsted Mills, Inc.*, 106 F. (2d) 263 (C. C. A. 3), the Board made a specific finding on the contention raised by the employer, and the court remanded the case to the Board for further evidence on the point. In each of these cases the court's opinion had reference to a substantive requirement where the issue of substantially equivalent employment was raised; in neither did the court evidence any intent to prescribe a procedural prerequisite for every reinstatement order. Neither *Standard Lime & Stone Co.* v. *National Labor Relations Board*, 97 F. (2d) 531 (C. C. A. 4), nor *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658 (C. C. A. 9), involved any question concerning the effect of equivalent employment upon a reinstatement order. And in *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652, 662 (C. C. A. 9), the court squarely rejected the contention made here by petitioner, holding that a finding as to the equivalence of subsequent employment "though helpful to the court is not essential to the validity of the order." See also *Bussmann Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783, 787 (C. C. A. 8).

It would seem clear that in seeking to avoid the normal reinstatement remedy on the ground that the person whose reinstatement is sought no longer satisfies the requirement that he be one "who has

not obtained any other regular and substantially equivalent employment," the employer must be relying upon a statutory exception which he must claim and the applicability of which he must prove. *Cf. Schlemmer* v. *Buffalo etc. R. Co.*, 205 U. S. 1, 10; *Javierre* v. *Central Altagracia*, 217 U. S. 502, 508; *McKelvey* v. *United States*, 260 U. S. 353; 357; *Hill* v. *Smith*, 260 U. S. 592, 595. Any other construction would require the Board in every case to introduce evidence and make findings concerning the equivalence of every employment of each person as to whom reinstatement might be ordered, even though some or all of the employments might be so plainly nonequivalent that the employer would not base any claim upon them. The Act contains no suggestion of an intent on the part of Congress to place upon the Board a time-consuming and purposeless burden of this nature. The Board, in the exercise of its discretion concerning the conduct of its procedings, should be free to omit inquiry into the equivalence of subsequent employments unless the employer raises and litigates the issue.[8]

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[8] If our contention is rejected and it is held that a determination that no equivalent employment was obtained is a condition precedent to the order of reinstatement, the date as of which the determination should be made becomes important. Neither Section 10 (c) nor Section 2 (3) specifies the time as of which employee status is to be determined for the remedial purposes of the statute. We submit that the proper time is the date of the Board's hearing, rather than of the Board's order or of the court's decree.

If the Court holds, however, that a finding concerning substantially equivalent employment is mandatory whether or not the employer has made any contention with respect thereto or adduced proof to support it, the most the Company could properly ask is that the case be remanded to the Board for the making of a finding upon the present record, or upon further evidence, if the Board deems such evidence necessary or desirable. Petitioner appears, however, to seek to have the matter finally disposed of here by contending that upon the record the Board could only find that Moore did obtain substantially equivalent employment (Br. 25–26). This claim is plainly erroneous: indeed we think that Moore's reinstatement should be upheld without remand because it is entirely clear that the Board would necessarily find that Moore's subsequent employment was not equivalent.

The Board found (R. 49) and the evidence establishes that Moore was earning $112.50 a month at the time his services as a roustabout terminated (R. 280, 474, 480, 492), that the rate of pay for his job as roustabout was thereafter increased to $125

The two dates last mentioned would necessitate constant remands upon the question of equivalent employment, so that far from being "workable" (*National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 870 (C. C. A. 2), certiorari denied, 304 U. S. 576), the Act would be a veritable "merry-go-round" (*International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 33 (App. D. C.), affirmed, 311 U. S. 72).

and subsequently to $135 a month (R. 298–299), and that shortly after his discharge he obtained a position as guard at the State penitentiary at Rawlins, Wyoming, at a salary of $70 a month with room and board, which has been his only income (R. 263, 271, 274, 280). The substantial difference between Moore's pay at the penitentiary and what he would have earned working for petitioner, the difference in the type of work, the change in geographical location, the loss of Moore's place as second in seniority in petitioner's plant (R. 267, 342), and, finally, the inference from Moore's desire to resume work for petitioner (R. 273) that the job as penitentiary guard was inferior to his employment with petitioner, are all factors which the Board has weighed in determining the non-equivalence of subsequent employment and which the courts have agreed are relevant.[9]

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[9] *Mooresville Cotton Mills* v. *National Labor Relations Board*, 110 F. (2d) 179, 180–184 (C. C. A. 4); *Subin* v. *National Labor Relations Board*, 112 F. (2d) 326, 331 (C. C. A. 3), certiorari denied, No. 280, this Term; *National Labor Relations Board* v. *Botany Worsted Mills, Inc.*, 106 F. (2d) 263, 269 (C. C. A. 3); *Bussmann Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783, 787 (C. C. A. 8); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 99 F. (2d) 533, 536, 539 (C. C. A. 9), certiorari denied, 306 U. S. 646; *Ransome Concrete Machinery Co.* v. *Moody*, 282 Fed. 29, 36 (C. C. A. 2). Moore's pay as a guard must be compared with the pay of $135 he would have received as a roustabout, not with the lower rate of pay he was receiving at the time of the discrimination. The *Mooresville Cotton* case, *supra*, 110 F. (2d) at 182; *cf. National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 872 (C. C. A. 2), certiorari denied, 304 U. S. 576.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below, insofar as it is here on review, should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 413.—October Term, 1940.

Continental Oil Company, Petitioner, vs. National Labor Relations Board. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 28, 1941.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In its petition the Continental Oil Company challenged various provisions of an order of the Labor Board which the Circuit Court of Appeals had enforced, but we brought here only so much of the case as pertained to the reinstatement of two men, Jones and Moore. 311 U. S. —. Continental's contention is that reinstatement was precluded because neither man remained an "employee" within § 2(3) of the National Labor Relations Act. The decisive question, however, as we have ruled in the *Phelps Dodge* case, decided this day, is whether reinstatement will "effectuate the policies" of the Act. We therefore remand the case for an exercise by the Board of its judgment on that issue, in light of our opinion in the *Phelps Dodge* case.

So ordered.

Mr. Justice Roberts took no part in the consideration or disposition of this case.

The Chief Justice and Mr. Justice Stone reiterate the views expressed by them in the *Phelps Dodge* case.

Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy are of opinion that the Board's order should be affirmed for the reasons set forth by them in the *Phelps Dodge* case.